SUPREME COURT, U. S.

FILED

MAY 17 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1220

THE CITY OF NEW YORK,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,
Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,
Respondents.

BRIEF OF TOWN OF CORNWALL IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

JAMES R. LOEB,
Attorney for Respondent
Town of Cornwall

RIDER, WEINER & LOEB, P.C.
178 Grand Street
Newburgh, New York 12550

Dated: May 8, 1972

Table of Contents.

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2.
Statement of the Case	2
Position of the Town of Cornwall	3
The Writ of Certiorari should not be granted	4
The Court below acted properly in all respects	4
Conclusion	6

TABLE OF AUTHORITIES.

CASES:

	Page
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402 (1971)	5
Gainesville Utilities Department v. Florida Power Corp., 402 U. S. 515 (1971)	4
Permian Basin Area Rate Cases, 390 U. S. 747 (1968)	4
Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965)	3, 5
Scenic Hudson Preservation Conference v. FPC, 453 F. 2d 463 (2d Cir. 1971)	2

STATUTES:

Federal Power Act	
Section 313b, 16 U.S.C. §8251(b)	2, 4
28 U.S.C. §1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1219

SCENIC HUDSON PRESERVATION CONFERENCE, *et al.*,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

No. 71-1220

THE CITY OF NEW YORK,

Petitioner,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

No. 71-1221

THE SIERRA CLUB AND ITS ATLANTIC CHAPTER,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *et al.*,

Respondents.

BRIEF OF TOWN OF CORNWALL IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit is reported at 453 F.2d 463 and is set forth in the appendix to the petitions for certiorari filed by Scenic Hudson Preservation Conference and the City of New York. That opinion affirmed an order and opinion of the Federal Power Commission licensing the construction by Consolidated Edison Company of New York, Inc. of a pumped storage hydroelectric project, the greatest part of which will lie in the Town of Cornwall, a municipal corporation of the State of New York.

Jurisdiction.

Jurisdiction is authorized under 28 U.S.C. §1254(1) and the Federal Power Act §313(b), 16 U.S.C. §825l(b).

Questions Presented.

The Respondent Town of Cornwall hereby begs leave to incorporate by reference the statement of the questions presented as the same is set forth in the brief of Consolidated Edison Company of New York, Inc. in opposition to petitions for a writ of certiorari.

Statement of the Case.

The Respondent Town of Cornwall hereby begs leave to incorporate by reference the statement of the case as the same is set forth in the brief of Consolidated Edison Company of New York, Inc. in opposition to petitions for a writ of certiorari.

Position of the Town of Cornwall.

The Federal Power Commission originally licensed a pumped storage project at Cornwall in 1965. Among other things the project, at that time, did not provide for a total undergrounding of the power house. In the first *Scenic Hudson* case the Court of Appeals set aside the licensing order and remanded the case to the Federal Power Commission. The Town of Cornwall intervened at that stage of the proceedings and has continued its involvement by participation in the hearings, the on-project inspection made by the presiding examiner and the argument before the Commission. The Town was permitted to intervene in the appeal to the Court of Appeals and the Cornwall Town Board has authorized continued participation in this matter.

The Town Board of the Town of Cornwall determined that it would be in the best interests of the Town and its residents to support this project. At each critical juncture during the six and one-half years since the remand by the Court of Appeals, the Town Board has continued its support. Their position accurately reflects the feelings of the overwhelming majority or the 10,000 residents of the Town of Cornwall.

Certainly no other group has a more immediate and personal concern than the people of Cornwall. Their unwavering endorsement is based upon a first hand knowledge and appreciation that the Hudson Highlands will not be ravaged as petitioners would have this Court believe. Moreover they know that when the project is completed, a rundown water front on the Hudson River will be restored and turned into a municipal park. While they may not have a direct interest in the power supply to New York City, they are understandably anxious that emergency power be available on an instantaneous basis.

The blackout of November 1965 struck Cornwall with the same disruptive effect as other communities in the northeast. They believe that the project will help insure that a similar power outage will never again occur.

The Writ of Certiorari should not be granted.

The Court below acted properly in all respects.

The Federal Power Act and the decisions of this Court set guidelines for a review of the Federal Power Commission's order and finding. The Court of Appeals followed those guidelines and correctly sustained the Commission.

Section 313(b) of the Federal Power Act provides that:

> "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

16 U.S.C. §825l(b). The Court of Appeals following this specific mandate determined that the findings of the Commission were, in fact, supported by substantial evidence.

Nor can there be a real dispute as to what is meant by substantial evidence; recent decisions of this Court including two cited by the Court of Appeals are clear in their guidance to the lower Courts, *Permian Basin Area Rate Cases*, 390 U.S. 747; *Gainesville Utilities Department v. Florida Power Corporation*, 402 U.S. 515.

In the petitions to this Court seeking certiorari, and in the Court below, the petitioners have urged that a new and broader standard be adopted when the Court review relates to matters of environmental policy. In

support of their proposal petitioner Scenic Hudson cites *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402. Respondent Cornwall cannot accept petitioner's reading of that case as in any way expanding or changing the standard of review to be followed by the Court. The old and accepted maxim that the Court may not substitute its judgment for that of the agency where the Court determines that the agency has done a complete and competent job is still the standard which must be followed. There is no valid reason for a change in the standard or method of review just because environmental issues have been considered by the agency. A major strength of our legal system is its ability to apply a time tested procedure for decision making to new problems as they arise.

Turning now to the theme which Respondent Cornwall finds underlying the petitions for certiorari. Each of the petitioners has said either explicitly or implicitly that the hearing examiner, the Federal Power Commission and finally the Court of Appeals did not fully appreciate all of the important issues in this case and the environmental questions raised. It is inconceivable that all involved failed to recognize that this project was one which would be scrutinized with the greatest of care and further that if the decision was to license the project that the same group who were successful in *Scenic Hudson I* would not once again test the validity of the new determination. Armed with the knowledge that a challenge would surely follow, those involved in the administrative determination and in the Court below would have been even more careful and diligent than usual to explore every possible alternative, to consider every related fact and factor and to carefully and properly reach a decision.

Conclusion.

There is no basis for the granting of petitioners' requests for a writ of certorari. The Court below did not err in making its decision; it has followed the statutory and case law guidelines set down for it.

The petitions seeking a writ of certiorari should be denied.

Respectfully submitted,

JAMES R. LOEB,
Attorney for Respondent
Town of Cornwall

Rider, Weiner & Loeb, P.C.
178 Grand Street
Newburgh, New York 12550

Dated: May 8, 1972